MICHIGAN SUPREME COURT

November 30, 2000 Public Hearing

JUSTICE WEAVER: Good morning. We're here on one of our public hearings concerning administrative matters. And we're going to commence with Item 1 which is 99-10, the issue being whether to amend the Michigan Rules of Evidence in accordance with the recommendations of an advisory committee on the rules of evidence. And my understanding is is that we have several people here who wish to address us on that matter, the first being Robert E. Erard. Dr. Erard. Would you please come forward. Would you please identify yourself as you begin your remarks, for the record.

Item 1 - 99-10: MRE Amendments

DR. ERARD: My name is Robert Edward Erard, Ph.D. I am representing the Michigan Psychological Association and I wish to thank the Court on behalf of the Psychological Association for the opportunity to comment on MRE 703.

JUSTICE WEAVER: And Doctor, let me explain to you and to everyone that you will have 3 minutes and when there's one minute left you'll see a yellow light come on and when your time is over there will be a red light and you can finish your statements.

DR. ERARD: Thank you very much. While it is true that some experts base their judgments on the products of formal discovery, much of which is destined to be introduced into evidence, the role of other experts is inherently investigative. That is, it is explicitly up to the expert to generate or discover a substantial portion of the relevant evidence himself. In matters involving such investigative experts, the revised rule would be totally unworkable. Two conspicuous examples of experts serving as independent investigators are in the areas of court-appointed independent child custody evaluations and independent medical or psychological examinations. In these and similar situations, experts cannot possibly anticipate much less control which of their many sources of information may ultimately be admitted into evidence. Indeed about the only thing they can be sure of is that much of the data that they would ordinarily consider in arriving at a professional judgment on the matter, much of it hearsay in its essence, will not be admissible under the other rules of evidence. Accordingly psychological and psychiatric experts will effectively be limited to offering opinions based on little more than their own direct observations of party's demeanor in their offices, with few if any of their

statements about themselves or their histories taken as evidence of the truth of the matter asserted. Expert psychological opinions based on such rag tag sources without the integrating features of a comprehensive psychological evaluation are unlikely to meet either professional or legal standards. As this Court itself noted in People v Dobbin, similar conundrums face any psychologist or psychiatrist serving as an independent psychiatric examiner pursuant to the Code of Criminal Procedure. While any discrepancy between an expert's factual assumptions and the evidence before the Court can and probably should serve as a basis for impeachment on cross-examination, not all such discrepancies should lead to the exclusion of the expert's opinions or testimony. An investigative expert is likely to gather information from many sources only some of which are essential to her opinions and conclusions but many of which provide the mortar between the bricks on which the opinion is constructed. The judge who is hearing the expert's testimony in the context of the totality of the admissible evidence is in the best position to distinguish between the essential and inessential features and thus whether to allow the testimony. In all likelihood, the proposed changes will reduce the effectiveness of alternative dispute resolution and decrease the frequency of settlements, lengthen and complicate the course of formal discovery, especially in areas like family law where it is currently not so prominent, greatly lengthen the course of trials as each of the bases of the expert's opinions must now be introduced before the court piecemeal through a vast body of witnesses and authenticated documents, and glut the appellate docket with child custody, personal injury, criminal and employment cases in which psychological experts have been used based on arguable mismatches between the ostensible bases of their opinions and the admitted evidence under Rule 703 as revised.

JUSTICE YOUNG: Doctor, I'm not insensible to the position you are arguing. My wife is a psychiatrist so I have some understanding, if osmotically, of how healthcare professionals form their professional opinions. But let me ask you how you would address, you're essentially arguing that the trial judge should perform a gatekeeper function in evaluation whether the testimony of an expert relying on non-admissible items should be admitted.

DR. ERARD: That's correct, Your Honor.

JUSTICE YOUNG: Let me ask you generally, it's been my experience as a practicing attorney that because of the current rule the expert is sort of poramenta (?), you can incorporate into the expert a great deal of information that would not be admissible and therefore get before a jury things that are problematic. How would you address the concern of the proponents of the rule change that the trial judge really isn't functioning as a gatekeeper and how would you propose that a lay, at least to you, judge would be able to evaluate whether you are relying upon data and information that is

appropriate.

DR. ERARD: Well, Your Honor, I think that there are quite a number of different ways that really can be addressed effectively both before and during the proceedings before the jury. First off, if there is concern on whoever is opposing the expert, assuming that this is not a court-appointed expert, that person has currently the opportunity to voir dire the expert, to depose the expert in advance of testimony before the jury, to offer a motion in limine, to investigate every single piece of evidence or kind of datum that the expert is likely to testify about, and to anticipate that there may be some mismatches between what the expert is basing his opinion on and the testimony. That can either be brought up before the Court and a court can issue a ruling prior to the expert ever setting foot in front of the jury or as is more appropriate in many cases, the mismatch ought to be dealt with in cross-examination as a way of attacking the expert's credibility and also

JUSTICE YOUNG: But that isn't a gatekeeper function. I'm worried about whether judges can competently do what you are suggesting when we're dealing with experts and the realm of expertise.

DR. ERARD: I think that judges are in the best possible position to do it because they know what are the essential pieces of evidence that need to get to the jury and that should not get to the jury, things that really are not evidence and are not appropriate for the jury to hear. They know that in the context of the totality of the evidence being presented in that case. It is much easier for them to make the determination about what are essential pieces of evidence on which the expert is basing an opinion and which should be heard by the jury and which should not.

JUSTICE YOUNG: Well I don't understand because you said, at least in your profession you rely on things that would ordinarily not be admissible.

DR. ERARD: I will rely on histories that people give me, statements, there's a lot of hearsay in it, but to the degree that it's an essential piece of evidence, something that my opinion is founded on, that is something that is likely to come into evidence in other ways before the court, or could be rebutted by evidence before the court.

JUSTICE YOUNG: Would you favor, or oppose or be agnostic on a proposal that would require an expert prior to trial submitting written report of the testimony.

DR. ERARD: Of course this does happen in federal court under some federal court rules and the system seems to work reasonably well.

JUSTICE YOUNG: Doesn't that system promote the gatekeeping function.

DR. ERARD: I think it does, yes. I think that certainly the expert should not be allowed to simply say it's my opinion and not offer opposing counsel the bases of that opinion in advance. I think it can be done in a number of ways. It could be done through voir dire, it could be done through depositions, but it could also be done by sending in a report in advance. Now I believe there's another rule of evidence right now that says the expert doesn't have to disclose the bases of his testimony in advance of his testimony. I'm not really sure what useful function that rule serves frankly. I don't see any reason why experts shouldn't be held accountable for each and every basis of their opinion and to share that freely and indeed our ethical principles require us to do that when we're working in a forensic context.

JUSTICE CORRIGAN: Mr. Erard, are you familiar with the pending amendment to Federal Rules of Evidence 703, sir.

DR. ERARD: I'm familiar with it, Justice, insofar as it was referred to in the advisory committee's report.

JUSTICE CORRIGAN: And what is your comment with regard to that, sir.

DR. ERARD: I think that that would certainly be less burdensome on the system than what has been proposed which is I think far too radical a solution. I did think that some of the advisory committee's criticisms of that approach were somewhat compelling and so I did have some concerns that there may be valid criticisms of it, but in terms of its practical effect on the operations of the legal system, I think it would be much milder.

JUSTICE KELLY: But your association recommends no change at all to Rule 703, is that correct.

DR. ERARD: That would be our recommendation, yes, Your Honor.

JUSTICE WEAVER: Any further questions, Justices? Thank you very much. I have Dr. Mae Keller.

DR. KELLER: I also have a position paper which I (inaudible). Thank you. I'm Mae Keller and I'm a clinical and forensic psychologist and I'm the current president of MSFP, the Michigan Society of Forensic Psychology which is a professional organization of licensed doctoral psychologists with expertise in legal mental health issues, membership being based on attaining certain credentials and training and also a peer review process. And our members serve as evaluators and experts in a variety of criminal, civil and probate matters. We're concerned that the proposed change to MRE 703 will do several things. First, result in extensive dispute about the admissibility of evidence relied upon by experts rather than streamline litigation in trial. Two, generate conflicts between standards of practice in forensic mental health and legal standards that will exclude data required for valid testimony and three, undermine the soundness of expert testimony to the detriment of the trier of fact. Based on our review of the proposed changes, we believe these problems will not be rare or exceptional but they will be common. And as Dr. Erard mentioned, especially in areas of practice not currently characterized by extensive discovery processes, and this may include criminal matters as well as those that he mentioned, juvenile court matters and many of the issues addressed in probate courts. Courts and experts will be routinely faced with either excluding information that is relevant to testimony or expending considerable time and effort entering such information into evidence. As to why this is the case, it is primarily because forensic mental health practice relies heavily on historical, archival information and collateral third party reports. This isn't considered frosting on the cake or something additional. It's essential to sound clinical practice. It is routine to review psychological records that may well contain a mix of admissible information and hearsay, to contact family members and gather other information. The proposed change will encourage what are now regarded as unsound clinical practices. In the position paper which my organization has submitted, we quote from one of the standard texts in this area, Psychological Evaluation for the Courts, which states "Archival and third party information is a mandatory component of most forensic evaluations as traditional clinical methods have inherent limitations as a means of obtaining information." We've illustrated a number of these difficulties with examples in the position paper and we would urge the Court to consider and reject the proposed rule change before it.

JUSTICE YOUNG: Dr. Keller, do you agree that the issue here is whether the judge can act as an accurate and effective gatekeeper in permitting that which should be admitted and excluding that which should not.

DR. KELLER: I certainly understand and sympathize with that concern.

JUSTICE YOUNG: Okay, what do you propose then to enable the judge

to be able to perform that effectively.

DR. KELLER: Well listening to the earlier exchange, the suggestion about written reports being required in advance seems to me to be something that is common practice in a number of areas and I can't think of a good reason why that shouldn't be how practice typically occurs. In addition to that

JUSTICE YOUNG: Would that include the bases for supporting the opinion, in your view.

DR. KELLER: Yes, the standard within our field is to provide written reports that reflect not only the opinion but also the assessment procedures utilized, the conclusions based upon them, evidence that conflicts with the final conclusions, why it is weighed as it is, why ultimately the opinion is offered as it is offered. And that's the standard within the field, although not everyone adheres to it all the time, unfortunately. In addition to that, I recall in the advisory committee's report that one of the dissenting minority statements suggested that there was a role for the Judicial Institute in this. Now I'm not familiar with how judges act upon or remedy these kinds of situations but that seems potentially sensible as well.

JUSTICE YOUNG: Well one of the problems is there are psychiatrists and psychological experts and then there are every other manner of expert. I guess generically we could train judges to be more sensitive to how to perform in a broad sense gatekeeping responsibilities, but assessing each profession's idiosyncracies would be a little more daunting task for training, I should think.

DR. KELLER: I would guess that that's the case. What occurs to me in that connection is that the field that I'm a part of is one that is developing its own internal standards and has grown a great deal over the past few years and I think will continue to do that. And the same authors that I quoted earlier also to some extent rue that mental health testimony goes so frequently unchallenged or unscrutinized. I think there might be a number of potential solutions to that. My concern is that the proposed rule change is again too radical a one and looks like it would result in greater soundness and rigor by being more legally restrictive. My concern is that in fact what it would do is prevent courts from knowing how experts do their work, think about their work, and it would foster experts conducting perfunctory and inadequate evaluations frankly.

JUSTICE TAYLOR: The committee, page 11 of their report, summarizes I guess in a sentence there what I think would be the fundamental flaw in the Michigan and federal versions of Rule 703. They say the problem is that it's the grant of authority to

decide disputed issues and substantive rights of parties on the basis of facts that are never proved. Can you tell me what you think about that.

DR. KELLER: If one is dealing with a matter that legitimately calls for expert testimony, there is an inherent tension between legal standards that exclude hearsay and these professional standards that experts are answerable to. And this has to be a matter of compromise ultimately. The question is what would be the best compromise, and again I think the proposed rule change is one that ultimately will not be useful to the courts. As it stands now

JUSTICE TAYLOR: If I might suggest to you, I don't think the problem that people are concerned about is the area you're in. I don't think in areas where mental health and things of that sort are at issue. I think where the tire meets the road in this thing is in altogether different cases where hearsay which is of a different kind that, I think we all understand how you folks function and appreciate that and understand the difficulty that you're pointing out, but what about an expert on metallurgy who comes in and gives information that the proponent just can't get in any other way that turns the jury around. This could be for either side in a case. All of a sudden, remarkably after 800 years of experience with our judicial system, we have litigants making assertions in court that they simply can't prove and juries perhaps concluding that that assertion is true even though it hasn't gone through the rigorous kind of test that proofs normally have to in our system. That's the problem we face. And as I say, I just don't think your area, when I practiced law I never remember anything that there was a runaway hearsay problem in your field because by the very nature of the kind of things you people testify to it does lend itself to cross-examination. You stand up and say the child told me X. The other lawyer gets up and says well he also told you Y didn't he, and so everybody gets it all out. But in these other areas that are the hard sciences, if you will, these things become very difficult because this rule as it exists as I understand it is subject to some abuse. And what I'm getting at here is maybe it's necessary to sort of have a different rule for certain kinds of experts, although that seems quite unworkable.

DR. KELLER: I'm not familiar enough with–I'm familiar with psychologists and mental health professionals' needs broadly, but not enough with other professions to know how onerous that would be for them. I also don't know if the issues you're raising would be usefully addressed by requiring reports.

JUSTICE YOUNG: Some experts are not professionals. They're just expert in a particular area by virtue of their experience. There are no professional standards to which they can be held accountable. They just know how combustion engines work.

DR. KELLER: Thank you.

JUSTICE WEAVER: Mr. Scott Bassett.

MR. BASSETT: Good morning. My name is Scott Bassett. I'm a private practitioner in Troy, Michigan. I'm a past chair of the State Bar family law section and I've been asked by the current chairperson of that section, Margo Nichols, to represent the position of the State Bar family law section this morning. The family law section has twice debated and considered this issue. The second time we have the benefit of the presentation by Judge Giovan. After that presentation, however, the council reaffirmed its earlier position I think with all the votes except one being cast, to strongly oppose the change to Michigan Rule of Evidence 703. Much of the reason for that has to do with the statements that Dr. Erard has already made to you this morning. I won't repeat that, but I do want to talk about the practical impact. I asked somebody who practices family law who has probably tried as many contested custody cases in this state as anybody else the last two decades. My concern is that in cases where a court appointed or perhaps even non court appointed expert has presented testimony, what we may be faced with under this essentially ironclad exclusionary rule is that we may have to bring in many additional witnesses that aren't typically called in a contested custody case. The one that troubles me the most is the prospect of having the children testify in open court. Under the ethical standards that govern what Dr. Erard does, the American Psychological Association has published a white paper on standards for child custody evaluation practice, one of the requirements is to meet with the children to observe the children with the parents and to learn from the children what you can learn. That's not going to be admissible under any other rule of evidence. I have tried. I lost a case in the Court of Appeals in the early '80s, Keller v Green, where it was clear that the child's statements under this circumstance are clearly not an exception to the hearsay rule, state of mind or any other way. So the way the child's impressions often come into the court, and preference is a factor under the Child Custody Act, is through the evaluator. The judge of course can meet and is required, if the child is of sufficient age, to meet with the child in chambers but that's a very stilted process. Not all judges are gifted at communicating with children or learning preferences from children, and sometimes a psychologist who has met with a child maybe 2, 3, 4 times, is able to give us more insight into a child's preference, a child's thoughts. Under those circumstances, under this proposed change to 703, any part of the evaluator's opinion that might be based upon information that came from that child could be subject to absolute exclusion unless we bring the child in to testify. There are other sources of information that would be either very expensive to obtain or would be simply repugnant for us to obtain, things like bringing in the teachers. It's typical for a good evaluator to make at least a phone call to the current or previous years' teachers of a child in a custody

case. To talk to the grandparents, to talk to neighbors. All of this of course is subject to cross-examination.

JUSTICE TAYLOR: I think we understand all that. What's the answer.

MR. BASSETT: Well the answer is clearly not an ironclad rule. The answer is some balancing test here. You need to look at does it make sense for an evaluator in this field to rely upon this information. That standard is in the current, soon to be replaced, federal rule.

JUSTICE TAYLOR: Are you suggesting a different rule for mental health professionals and child custody professionals.

MR. BASSETT: No, I'm not.

JUSTICE TAYLOR: Then how do you take care of the combustion engine, metallurgical engineer problem.

MR. BASSETT: The same way we should have been taking care of it all along, which is looking at the court as the gatekeeper of that

JUSTICE TAYLOR: But what if that hasn't been happening.

MR. BASSETT: Then the answer is not a change to the rule that creates enormous problems for half of the cases in our court system in the family law area.

JUSTICE YOUNG: What is the answer then. Really I'm looking past the current proposal.

MR. BASSETT: Judicial education, I think, is the real answer. To let the trial court judges know that this is an important function that they play. We all know

JUSTICE TAYLOR: There s a tremendous amount of pressure out there on judges to let it in for what it's worth. You've heard that. And that's the problem we're dealing with here. What it's worth is we've got information that's unreliable in front of a jury and the victim party is really pretty much incapable of doing anything about it.

MR. BASSETT: I'm at somewhat of a disadvantage in answering those questions because my question has been limited to family law for almost my entire career but one of the things I've learned as a trial lawyer in the family law area is the best

indication you're making persuasive inroads with the court is you start losing all the evidentiary rulings but the real issue on that question is how much of a problem is this. How limited is this. Do you change the rule of evidence that's been working for probably the vast majority of cases just because there is an issue on a minority of cases, maybe products liability cases, like that. The answer is no don't change the rule, change the practice.

JUSTICE CORRIGAN: Mr. Bassett, I'd like to ask you, because you're reflecting the views of Dean Reed in his dissenting statement to Rule 703.

MR. BASSETT: That's not surprising. He was my evidence professor in law school.

JUSTICE CORRIGAN: And I'm trying to really weigh the committee's product. We had an 11-member committee and we were blessed really to have several of the original members of the Rules of Evidence Committee from the '70s to serve, including Judge Giovan. And many experienced trial judges, prosecutors, etc. The people who gave us Rule 703 to begin with have looked at it and said there have been these abuses. We're direly concerned about them and Dean Reed's dissenting statement did not carry any weight with the balance of the committee members. In other words, they do not see judicial education as a solution on the gatekeeper function. They see us going so far afield from the necessity of reliability, that we've gone so far away from that, far beyond what they ever intended when Rule 703 was initially adopted. So I'm having trouble, I hear you and guess I'm surprised to hear you say you don't support an exception for child custody or mental health cases because to me that would be a more palatable way to balance the issues that you're raising versus what the committee is telling us about their collective experience over the last 25 years with this rule. So I need you to help me sort through my deliberating process on this.

MR. BASSETT: Justice Corrigan, I don't know if I can give you a complete answer that will satisfy you but one of the things that I think this Court needs to look at is just what is the magnitude of the problem that the committee is trying to solve. It's an excellent committee. I took a look at the list of the members of the committee and I certainly can't quarrel with their qualifications. I've practiced in front of Judge Giovan, wonderful human being in addition to a wonderful judge. That's important. But the question is, are they accurately perceiving the magnitude of the problem. Are they using the amputation of a leg to cure a hangnail. I think that's really what you're going to have to decide. The practice area that I'm in represents fully half of all the cases in our court system. I know for that half of the cases this is not a problem. There are a whole range of other cases where clearly this is not a problem so maybe what you're looking at here is a

problem that may be acute in certain cases, but maybe it's a small percentage of the cases and maybe the less drastic solution that does the least damage to our system of justice is in fact working at the educational end of it rather than a change of the rule. Take a look at the federal rule in the proposal which creates a balancing test of probative versus prejudicial. It also, as I read it, talks about submitting evidence to the jury. Does it create an exception for bench trials. I certainly think it could be read that way. My cases are all bench trials. In the family division we only have two different types of jury trials, the adjudicative phase of abuse and neglect cases and paternity cases. Those don't typically present these types of problems simply because they typically deal with either psychological evidence or fairly well-accepted DNA evidence in the paternity cases. But I don't think creating an exception for the family law area or for bench trials is necessarily the answer for multiple evidentiary codes.

JUSTICE CORRIGAN: Are you familiar with the position that the State Bar took on this rule.

MR. BASSETT: I don't think I've seen that.

JUSTICE CORRIGAN: We just got a submission from Mr. Barry on behalf of the State Bar and apparently there was huge controversy over this rule with them and interest in the new federal rule so that sort of a recognition by the Bar Commissioners, etc., that there's a problem in the way 703 is being administered currently and that we need to be looking at other solutions because of the problem of abuses. And I may not be accurately synthesizing but I get the thrust of their position is that maybe you ought to look at the recent federal amendments.

MR. BASSETT: Maybe that is worth looking at but I still think that what you need to decide is what's the magnitude of this problem and what type of solution does it require. Clearly if you take the measured conservative approach to this, you try the educational process first before you reform in a major way our evidentiary code, or create different evidentiary codes for different types of cases.

JUSTICE WEAVER: You say your experience is in the family and I know that's the family area, is that correct, and you just told Justice Taylor that, so if the rule were to remain as it is for the family and the mental cases but there was a different rule for the other cases, how would that harm and damage the system.

MR. BASSETT: It wouldn't harm the family law cases per se.

JUSTICE WEAVER: Well how would it damage the system, because you

say you haven't practiced in the other.

MR. BASSETT: I simply don't know. The question I'm raising is, how big of an issue is this really in magnitude. I can only talk about half of the cases.

JUSTICE WEAVER: Could that not be a solution that could solve all the problem.

MR. BASSETT: It may if it's good judicial policy to create separate evidentiary codes for different types of cases. I think that's an overriding issue that you're going to have to address first.

JUSTICE WEAVER: But your area that you have expertise in, if the rule remains as it is and for the mental, that would solve your problem.

MR. BASSETT: I want to make it clear that the family law section is opposing the change to the rule in its totality. They did not recommend separating out. However, if you're looking at my particular area of practice, I don't the rule to change in my area of practice. I'm not an area in the other areas.

JUSTICE WEAVER: Okay, we understand.

JUSTICE KELLY: Now I understand you to say that children would be forced to testify against their parents conceivably in custody matters.

MR. BASSETT: It could conceivably happen.

JUSTICE KELLY: And in custody trials would it affect the length of custody trials.

MR. BASSETT: It would. I don't know if the Court is aware, but I did express my concerns in a letter to Justice Kelly as soon as the rule was proposed by the committee but before it was actually published by this Court, and among the concerns we had is the lengthening–doubling or perhaps even tripling the length of child custody trials. Dr. Erard was the court-appointed expert in my longest custody trial ever. It lasted three full weeks, went on consecutive days. That was burdensome enough. One of the things we had to fight against was the efforts by the other attorney to have the children testify in open court on the issue of custody in front of their parents which would have been a horrible experience for them. One of the things we were able to avoid also was bringing in the teachers, the grandparents, the neighbors. Those are the kind of underlying data that

a psychological expert needs to at least explore, looking for clues as to what may be going on in this family in order to formulate an opinion. If in fact that opinion cannot be offered unless these people testify, then we are looking at many, many more

JUSTICE WEAVER: Again, Mr. Bassett, your time is up and if in fact we leave the rule as is for the mental cases and the family cases, the custody cases, you will not have any of those problems.

MR. BASSETT: You will not have done any harm to the children of the state of Michigan.

JUSTICE YOUNG: Just one more, please. Do you agree with Drs. Keller and Erard that requiring an expert to post their opinion on the bases before testifying

MR. BASSETT: I think that's reasonable, Justice Young. In all the cases that I handle that's what happens. The evaluator is expected to submit a written report. We have an opportunity to depose. We have an opportunity for discovery. That's only fair.

JUSTICE YOUNG: Do you think that aids the gatekeeper function of the judge.

MR. BASSETT: I think it clearly does because it allows counsel to assist the court in pointing out those areas that may not be a valid basis for the expert's opinion. Thank you.

JUSTICE WEAVER: Thank you very much. Now Judge Giovan, who has had his name mentioned several times here.

JUDGE GIOVAN: May it please the Court. The Court has received a number of written comments about the proposal, particularly with regard to Rule 703 and I would like the opportunity to respond in writing to some of those because I can't possibly answer all the questions raised in the few minutes I have this morning. But because the most vocal of the opponents to the rule have been some of the family law practitioners and the mental health experts who work with them in child custody cases, I'd like to address that scenario if I may. As Mr. Bassett mentioned, I did appear at the family law section meeting on November 4, hoping I could change some views on the subject and as you can see, I was singularly unsuccessful. I appear not only as the chair of the committee, but representing that I did this work for 22 years. I decided child custody cases for 22 years, from the day I became a circuit judge until the family court came

along. And I suggested to them that the scenario of having opposing child custody experts was one that they should not be attempting to support, as opposed to the independent child custody expert that would be appointed by the court, where they could rely on hearsay under the authority of the Friend of the Court statute. And I'll explain that to the Court. That is available and they can rely on hearsay, an independent expert as opposed to the scenario that I'm addressing and that is where each party hires its own expert. And what I suggested to the counsel is that this scenario, in my experience, was a burden on the families. Number one, it's very expensive. It costs $5,000 for one of these, just one. And if the other side does it that's another $5,000. This is before they get to court and before you pay them their $250 an hour when they appear in court. Secondly, I found that it prolonged trials, it didn't shorten them. Most of the cases I tried were before the advent of child custody experts. They took a day, they took two days. When the child custody experts started coming into the case, the cases got longer. And the reason they got longer is because the experts want to do a good job so they go through all of the 12 factors that are in the statute that the judge is commanded to address and they write a great deal about every one of these and they testify a great deal about every one of these and it takes time to cross-examine them. In one case they started cross-examining them on how they scored the MMPI tests and everything else. It extends the trial, it didn't make them shorter. And I found in the end, other judges may have a different view, I didn't find it particularly revealing. And the reason is, there wasn't much science involved. And I think I even heard Dr. Erard say this one time. What they really do is they go through the 12 factors just as a circuit judge does. And I thought it was the responsibility of the circuit judge to make those evaluations. Rather than listen to a child custody expert go through them and pick one or two of the opposing opinions. And then finally I asked rhetorically why do you do this if there was any truth to what I said, to my particular experience. I suggested to them that the reason they do this is because the rules allow for it. If you hand somebody a lethal weapon, that is attorneys, they have to use it. That is somebody who can not only give an opinion but import into the case with it all of the hearsay on which their opinion is based, you have to use it. And they'll get sued for malpractice if they don't do it. If the other side hires a child psychology expert and they don't and they lose, they're liable to get sued for malpractice. Now that didn't carry the day, those arguments, but what I didn't know when I made that presentation to the court is that the family law council had issued this issue of the Family Law Journal on expert witnesses. And you have to believe me that I didn't see this until yesterday. I sent away for it and one article in here I found very interesting was written by Dr. Melvin Guyer. He's a person who testifies in these child custody cases. He's a clinical professor in the Department of Psychiatry at the University of Michigan. Adjunct Professor in the Department of Psychology. He has written in the Journal of American Academy of Child and Adolescent Psychiatry, the Journal of the American Academy of Child Psychiatry and the like. May I quote just a couple of things from his article. "In some spheres of expertise and certain child custody evaluations and

the expert custody visitation recommendations that emerge from them are candidates the reliability and validity of clinical expertise is being challenged by a growing body of empirical research studies." Couple sentences later: "We do know from scientific research relating to clinical decision making that clinical predictions which are the essential, though sometimes unexpressed underpinnings of custody evaluations, are in a number of forensic areas quite unreliable and often have only a modicum of predictive validity. In some spheres of clinical prediction, the validity reliability measures associated with those predictions are so low as to render clinical judgments' usefulness little better and sometimes worse than chance." And here's how he concluded this article. "What then is the clinician doing here and why do custody evaluations still persist. Well, even if the clinician is not doing what they or the court thinks they are doing, they are doing something. We should be honest about what that is. For one, clinical study evaluations generally put an end to disputation. When the clinical evaluation is complete the parties are emotionally and financially spent. This puts an end to disputation. When the expert submits a report, he/she sits as the de facto judge presaging what will happen in the courtroom. This puts an end to disputation. When the evaluation is complete the parties may feel heard and believe that the child's fate has been determined by one who enjoys some special knowledge of human nature and its determinants. This belief puts an end to disputation. The honest part of understanding the activities of the clinical custody expert is knowing that the role they play and the expertise they bring is not scientific nor even based in special knowledge and experience. Instead it is palliative to some of the persistent conflicts that attend the end of a marriage. The troubling question is how or whether to preserve this ameliorative function with its fictions when we know that it's predictive validity is similar to flipping coins in the courtroom at a time when Daubert and Cumo call for much more." Here in this same issue was something written by a practitioner, James J. Harrington, I don't know the gentleman myself. "Prudent and responsible family law practitioners have an ethical and fiduciary responsibility to explore the possibility of a reasonable compromise with the opposing party prior to triggering the thousands of dollars in expense associated with retention of an expert. The involvement of an expert rachets (emphasized) the litigation to a new level. This may harden the position of the parties and make it more difficult to conclude the case." Couple lines later. "The undersigned takes serious issue with attorneys who demand a massive retainer for a custody client, do not conduct their own frank and honest appraisal of the facts and the law, but dump the issue on the expert's lap and bail out when then expert recommendation is adverse. Innocent children are the long-term victims of unjustified custody litigation certainly. The threshold standard in family law should be a great deal higher than a mere MCR 2.114 non-frivolous basis." And finally, if I may, Mr. Bassett wrote an article in this same issue and it was not about child custody experts, it was about valuation experts and I'm sure that his advice was correct but if I may, I'll just read the concluding paragraph. "When your client can afford an expert, hire one. Your malpractice

carrier will thank you. When your client can't afford an expert and you have it in writing that you have recommended hiring an expert but the client declined, use of these techniques may be the best you can do to effectively represent your client." And the article was about methods of getting the job done without hiring an expert. The point is, it is the rule that has produced this scenario and the great part about it is is that the law still allows for the case–I would not deprive a circuit judge the opportunity of getting a child custody psychiatrist, psychology expert if they wanted one. There is an avenue of doing it under the present rules, that is under the Friend of the Court statute and I'll explain that in writing. I don't want to take any more time of the Court.

JUSTICE CORRIGAN: Please don't sit down, Judge Giovan.

JUSTICE WEAVER: We have some questions.

JUSTICE CORRIGAN: Yeah, really, this is an important day so we want to hear from you. I wanted to ask you, with regard to the point that Mr. Bassett was making a few moments ago about Dean Reed's position that judicial education is the cure for the gatekeeper sorts of abuses that we have been experiencing. Could you just shed some light on how the committee viewed that, if they did take that into consideration. What the process was in the meetings of the committee with regard to Dead Reed's proposal.

JUDGE GIOVAN: Dean Reed was also my law school professor, I will tell you. And I could never approach his expertise and intellect and his knowledge of the law of evidence but the only advantage

JUSTICE CORRIGAN: You served on the original committee where Dead Reed was the chair.

JUDGE GIOVAN: I still could not approach his knowledge of the law of evidence. I served with him but the only advantage I do have is that I have been practicing law, I started practicing law in 1962 primarily in the trial area. I've been a trial judge since January 1973. I know a little bit about the interaction of this rule and what happens in a courtroom and this discretion that the Dean refers to has been in place from the day the rule was written. From the day the rule was written. And you must believe me when I tell you that it is never invoked. I have to retract. In all of the years since the rule was enacted, March 1, 1978, one lawyer, one lawyer, and the reason I know this is because I have been conscious of this. I saw the hearsay coming in from the beginning and I sat there waiting for somebody to tell me, judge don't let this in until the underlying facts have been proved. You must believe me, one lawyer did that. Now there were

maybe 3 or 4 other lawyers who made objections that told me they were in a way relying on the second sentence of Rule 703 without realizing it but that's the extent of it. In my original letter to the Court I gave you a scenario where the very experienced lawyer was cross-examining an economics expert on whether the plaintiff had suffered a brain injury. Why was he doing that. Because as part of the introduction of the economist's testimony, he was giving the facts that he was relying on and he said, well yes, the plaintiff suffered a closed head injury. And part of this he got by talking to the plaintiff, mind you, the rankest of hearsay. And so the cross-examination was not about what he was there to testify about, which was the economics, that is if somebody does have a severe closed head injury what can you earn. The lawyer was cross-examining the economics expert who was a history major in college, about whether the plaintiff had a closed head injury. And of course, the man stood his ground. He started answering the question. And when the lawyer finally protested I said to him, well you know if you had bothered to object in the first place I wouldn't have allowed him to say that. And you know what he said to me. He said Judge, I have made that objection numerous times and it is never sustained. So much for the discretion of the court. One lawyer told me that a judge who he named, in an adjoining county, when he raised that objection the judge told him don't you ever raise that objection. Don't you ever raise that objection. The second sentence of Rule 703. The fact of the matter, and when you think about it

JUSTICE YOUNG: Is this an educational deficiency in our judiciary and is it a deficiency that education alone can remediate.

JUDGE GIOVAN: When you think about it, you see this is the only time maybe in the history of the world, of the English speaking world, where a ruled exclusion has been made optional. There is no other circumstance–we have rules of exclusion. They are not optional. Now you might get various differences from one judge to another and we all argue whether the rule excludes a certain piece of evidence, but the second sentence of Rule 703 is the first time in history that a rule of exclusion has been made optional. Now what is the easiest thing for a busy trial judge to do if it's raised is to say, well okay, I can let it in or I can not let it in. But we don't get to that point because the objection is never made.

JUSTICE YOUNG: Sounds like there needs to be bar–well maybe there is a two-level training that needs to be done here.

JUDGE GIOVAN: Okay, but when you come down to it, what is the underlying policy anyway. Why should there be a rule that says, and it does say this, that the facts that are essential to an expert opinion, which means the facts that control the rights of the parties, why don't they have to be proved. Nobody stops to ask that. Well the

reason is because this rule was enacted just to eliminate piddling little objections and the typical example was when the basic rule was operative, which said you can't base an opinion on something that's not in evidence, otherwise the finder of fact can't tell what trust to invest in the opinion. People, and it typically happened where a doctor was on the witness stand and it might have been the treating doctor and he or she wants to make a prognostification of what's going to happen in the future and someone said oh, doctor, part of your opinion is based on the x-ray report. Yes it was. And you didn't take the x-ray report, you just read the report from the other doctor. And he said well that's true. Objection, you can't testify. I sat as a judge and I worked as a lawyer during that time. The opinions never got excluded. What happened is the doctor would say well you know I don't really need the x-ray report or if worse came to worse, they went and got the x-ray and the doctor said yes, this x-ray says exactly what the report says and he went on to give his opinion. The federal advisory committee said well look these things that professionals rely on in their everyday work, they make life and death decisions on these things, we're not going to keep them from making a judgment based on them. But the trouble with that is is that when the rule was written it wasn't written about the family doctor who made life and death decisions, it came out with experts, which means anybody who can qualify as an expert. And what they can rely on is whatever experts rely on in their everyday work–in the federal rule. And that has come to mean that an FBI agent can get on the stand and repeat the hearsay that he heard on the street to get the defendant convicted. And the Michigan rule doesn't even have that protection. Does everyone realize that. The Michigan rule is not limited by things that experts rely on in their everyday work. It doesn't matter because that has meant nothing in the federal scenario if you read some of the cases that we cited to you. Even there it hasn't been a barrier to any of this. But it doesn't even exist in the Michigan rule. And the reason it doesn't exist in the Michigan rule is because the Supreme Court did something that at the time seemed very shrewd to me anyway. They said wait a minute, the things that experts ordinarily rely on might be the whole case. So we're no just going to say that it comes in just because it's something that experts ordinarily rely on. We have to trust somebody to decide whether the opinion should come in based only on hearsay so we'll let the trial judge do it. So that's why they put the second sentence in there and they said well if the judge thinks that this is important enough that it's got to be in evidence before someone gives an opinion on it, then the judge can make that decision. That I think was, at the time, very shrewd but that Court could not have foreseen what has happened. There is no sieve, there is nothing that limits what experts can rely on under the practice, and the discretion of the trial judge that was deemed to be the protection when the Supreme Court enacted the Michigan evidence rule has been non-existent. And if someone decided, may I add, that the avenue to curing all of this would be educating the bench and the bar, a practitioner would have to fight this battle in every courtroom. We have 64 one-county circuit judges. They would have to go from one courtroom to another, to each one, and persuade each judge that they should

exercise this discretion. Not to mention the rest of the 600 judges in this state. It hasn't happened in the last 22 years and it will not happen if the rule remains the same. That's a long answer to your question, Justice.

JUSTICE WEAVER: Any further questions, Justices.

JUSTICE TAYLOR: Can I ask you one thing. Do you feel that there's any exception needed to the proposed rule that you're recommending. We talked about that a little bit with the prior witnesses.

JUDGE GIOVAN: Okay, there's been a lot of talk about mental health but it is not true that mental health cases will be affected. You know, one of the letters said well this is going to affect juvenile and neglect cases and you know, without any support. So I spent, before coming here, a lot of time educating myself. The statutes and the court rules are rife with provisions that say in mental health cases you can admit hearsay. I talked with judge, and I brought with me a schedule of the standards in evidentiary health cases and I spoke to Judge Newman who wrote the article in the Bar Journal about it and I will spell all this out for you when I make my report. In the vast majority of juvenile neglect and mental health cases, hearsay is freely admitted. The exceptions are these. When you are in a juvenile adjudication delinquency it's a criminal case. So the rules of evidence have to apply in there. I don't think the Court would say that in those cases an expert should get on the stand and say yes I've reviewed all the evidence. In my opinion the juvenile is guilty. Okay that's one place where the rules of evidence do apply. The other is in termination of parental rights, the rules of evidence apply there. And I am going to suggest to you that there should not be this exception that in those very serious kinds of cases that experts, because we call them an expert, should be able to get on the stand and bring in all the hearsay with them to convict the juvenile or to deprive some parent of his custodial rights. The one situation, however, where I do think that there might need to be an exception, from my conversation with probate judges, is in mental health commitment hearings. The statute says that those hearings are to be conducted according to the rules of evidence. And there are no exceptions that I'm aware of. I'm told by probate judges that typically a psychiatrist gets on the stand and recites a lot of historical data they call it, it's hearsay, but it's historical data and the hearings are very short. If they had to bring in all the witnesses to support this commitment it would prolong those hearings and I think that requires some attention. Some of the letters that you've received talk about insanity defense cases. There's an exception by statute for insanity defense and mental competency hearing. People v Dobbin was cited to you but People v Dobbin was construing a statute which allows experts on insanity to rely on historical data. What they mean is hearsay. So generally speaking we don't need an exception for mental health cases, and we certainly should not have one for child custody

cases I suggest to you.

JUSTICE CORRIGAN: Could I just say on behalf of myself, certainly, and I believe my colleagues, agree, I'm personally very grateful for the work of the committee. Your work product was exceptionally fine and I know that you had many meetings and you invested tremendous amount of extra work and time in this project in the service of the court and I'm very grateful to you.

JUDGE GIOVAN: Thank you, Justice, but if I may, as I said I do intend to submit something else in response to some of the communications you've received and I thank you very much for the opportunity to appear here.

JUSTICE WEAVER: Thank you. That concludes Item 1.

JUSTICE KELLY: There is somebody else who wants to talk.

JUSTICE WEAVER: On Item 1. I don't have you listed for Item 1 Mr. Bush.

MR. BUSH: I didn't intend to speak on that but after hearing from the testimony I would like to just address the Court with a couple facts. My name is Jerry Bush. The issue in your decision on number 1 here has been to whether the rule of evidence applies to certain things. And I have no idea what that all involves other than what I've heard today but just to tell you a fact. An acquaintance of mine had a mental health competency hearing not too long ago, earlier this year. And as far as I know there was no expert there. And he was found incompetent to stand trial, spent six months in a mental health institution. They charged him $352 per day to be there. And as far as I know, the only thing that was available to the court to decide the issue was an expert evaluation from some psychiatrist down in Milan, Michigan that had been sent to the judge. I went to his re-evaluation which lasted less than 10 minutes and I couldn't even hear what was going on because it was conducted right before the bench and there was nobody there except me in the courtroom and two lawyers. By the way he had a court-appointed lawyer and the court-appointed lawyer recommended that he be incompetent and so that's what happened. And this was over traffic offenses, by the way, basically. So there is some problems with this if it's no being used right or whatever, but I just wanted to supply that fact for you. In another situation regarding workmens compensation, these mental health experts don't even have to appear and be cross-examined. In a case where I was involved as a plaintiff you might say, I wasn't even there for depositions on cross-examination so I would inform you that there are some factual things that might be problems with these rules of evidence whether they go one

way or the other, I can't tell you.

Items No. 2 and 3: 99-35, 99-56, 00-18

JUSTICE WEAVER: Thank you, Mr. Bush. Now Mr. Bush, we have you listed for the next one so maybe we'll just keep you right here. This is number 2 and number 3, 99-35 and 99-56 and 00-18. These involve whether to adopt several proposed changes in rules affecting Court of Appeals practice, whether to amend the rule to permit individuals to request an unpublished Court of Appeals per curiam opinion be published and whether to rescind Standard 11. So Mr. Bush if you would like to go forward since you are here.

MR. BUSH: I thank you. The only comment that I have anything to say about would be the 99-56, whether to amend the rule to permit individuals to request that unpublished opinions be published. I think that's a good idea. I would ask that the Court adopt that. The one thing I would add is, I don't know if the Court has ever decided, I don't think it has, what precedential value an unpublished opinion has but I think it is going to have a chance to do that. Whether it decides to take the case or not is the question. I'm going to go back to my chair but I would like to speak on behalf of the unrepresented people at the end of today's

JUSTICE WEAVER: Well Mr. Bush, why don't you do that right now, whatever it is you have to say. You still have a minute or two within your time. We don't have that on the agenda today so whatever you have to say why don't you go on and share it with us.

MR. BUSH: On behalf of the people of Michigan I think that there is nobody that is speaking for them with regard to constitutional rights. I've brought a Detroit area phone book and I've looked through this for attorneys who represent constitutional rights and can't find any. There are some we know who do represent people on independence cases where their constitutional rights are violated and they try to protect them and so on. But it concerns me that there are a number of cases that the Court has decided or heard where the rights of the people are not being represented and people are not being able to address the court basically because they are not attorneys. And I would refer to the Blank case that the Court decided recently. No one spoke on behalf or briefed on behalf of the prisoners' children or their families the constitutional rights that the prisoner brought up. The right to see their father or mother who is in prison. And I would remind the Court that attorneys don't always have the view of law that the people have or that the defendant has or that the plaintiff has when they come to court, whether this Court or the Court of Appeals. I would have liked to have had a chance to address the

issue of teacher tenure rules as it was addressed in the Blank case. I mean I don't think it was addressed but that had application to the teacher tenure rules. In the Lewis case presently before the Court there is discussion of remedies for constitutional right violations and whether or not they should have any remedies. Now I don't learn about this case until it is already scheduled for oral argument and I find the little blurb maybe on the website or here in the Court. But no one is there representing the people. I mean the Attorney General is there arguing against the constitutional rights. Remedy. I read some of that brief. But there is nobody arguing there that we ought to be protecting the constitutional rights of Lewis, let's say, or the other people who are there, and providing a remedy for them other than his own defense attorney, I mean plaintiff's attorney. But it goes way beyond his case. The Attorney General cited 5, 6, 7, 8, 9 different cases where there had been constitutional rights violations and no remedy, saying that's what should be the status quo. I'm saying that's not what should be the status quo. Every day we are having our constitutional rights violated, all of us, me included. This person I told you about without the expert being there to be cross-examined, his attorney selling him down the street, and nobody is representing them. I'm here to represent the people. I came on my own $100 bill. The Attorney General comes on the state's $100 bill and somebody else comes on theirs. But I want to try and represent that some of these people like the judge said, the poor, are paying $5,000 for an expert to determine whether or not they get to keep their own kids or how long they get to keep them. It's unreal.

JUSTICE WEAVER: You need to wrap up, Mr. Bush.

MR. BUSH: I guess what I'm asking is that the Court craft some way that the people can address the Court. If I bring to you an amicus brief it's thrown in the trash because I'm not a lawyer. I have no other way to talk to you. This is the only way and that's why I've come. If there is some other way that you can figure out that we can have a say. We don't even know what these cases are until almost after the fact. Like the Lewis case now. You've got to decide that case. You've had oral arguments. We were informed that there were oral arguments but we can't make any input to that case and to me it's very bothersome that we have that much of a closed system. There were some other things but I guess I'll quit. Any questions.

JUSTICE WEAVER: Any questions? Thank you Mr. Bush. Now we also had Mr. Flanagan to speak on items 2 and 3.

MR. FLANAGAN: Your Honors, I'm Terry Flanagan and I'm today wearing two hats, speaking on two separate administrative matters. On 00-18, I wrote my letter on October 6 with my private attorney had on. Since that time the appellate defender commission has written a letter to the Court taking the same position that I have that

Standard 11 should be continued. So I'm speaking then now as the administrator of MAX (?). With the separate matter with regard to the Court of Appeals proposal which has two numbers, I'm not sure which one deals with Standard 11. I'm here speaking as a private attorney because appellate defender commission has not taken a position on that.

JUSTICE YOUNG: It hasn't?

MR. FLANAGAN: They have not. Their letter is only captioned 00-18 and it doesn't address the Court of Appeals proposal. The question is not whether continuation of standard 11 should be constitutionally required. It cannot be. I concede that under People v Denany that there is no right to hybrid representation. This Court has already ruled that. So the question is not whether it is constitutionally required, it's whether the sound policy should be continued and I assert that it should. This has been in effect since February 1, 1982, going on two decades now, and Standard 11 has proved over the years to be a safety valve, a safety valve to the integrity of the appellate process; a safety valve for defendants, for defense attorneys, for the courts and for the public resources. For defendants it's a safety valve because it gives them the opportunity to preserve issues that their attorneys for good reason or not have refused to raise. It's a sad fact but attorneys do in fact miss issues. If the defendants have the opportunity–I'm sorry do I have extended time because I'm speaking on two issues.

JUSTICE WEAVER: You still have more time. Yeah, and you have two issues here.

MR. FLANAGAN: If in fact the attorney will not raise the issue because he does not believe it is arguably meritorious the safety valve is in place so the defendant can at least have an opportunity to raise it on his own. Because, as the Court well knows, the procedural rules for both motions for relief from judgment in state court and petitions for writs of habeas corpus in federal court essentially doom any new issue that is being raised for the first time in those proceedings. It also is a safety value for the attorneys. I'm not sure that this has been highlighted much, but it reduces grievances. It reduces complaints about the attorneys. If the defendant knows in fact that he's got an option available to him to file this issue on his own, then he is less likely to grieve his attorney. He is less likely to request substitution of counsel in the trial court. The continuation of Standard 11 fosters a healthier attorney-client relationship and it reduces the attorney's need to withdraw when there is a breakdown, prior to the breakdown occurring, the attorney will be able to tell the client that in fact if you disagree with my reasoned opinion that this is not a viable issue, then you can raise it on your own.

JUSTICE YOUNG: Do you have any idea what the position of the

Appellate Defender Commission is. I have a letter dated May 15, 2000 written by the then chair, John Scott, acquiescing in a Michigan Judges Association proposal to rescind not only Standard 11 but all the minimum standards and substitute therefor the Michigan Rules of Professional Conduct provided that MAX remains the supervisor of state-supported defense attorneys.

MR. FLANAGAN: Your Honor, in the concluding paragraph of Mr. Scott's November 15 letter on administrative matter 00-18, he notes that the position taken now is not inconsistent with the position taken back in May, that is, the Commission has agreed to rescind the standards if they are replaced not only with the Rules of Professional Conduct but if there are advisory principles that govern the conduct of appointed appellate counsel. Eight advisory principles were submitted to the Michigan Judges Association which is now in your Court's lap, and one of those 8 is number 4, which mimics word for word the present Standard 11.

JUSTICE CORRIGAN: I don't think the Court has officially received that document. It was sent to the MJA but as far as I understand it, perhaps you can correct me but nothing that I have shows what the Appellate Defendant Commission's position is.

MR. FLANAGAN: I certainly will fill that void because I know that MJA president Judge Barry Howard wrote the Court within days after receiving Mr. Scott's letter of May 15, forwarding on the MJA's task force report and making mention of Mr. Scott's letter so clearly if the Court doesn't have it before it, I will remedy that immediately.

JUSTICE CORRIGAN: All right so they have met and they have acted to make recommendations regarding the standards and that will be sent forthwith to us. I have some other questions regarding this on Standard 11. In the documents that we've received there is an indication that there were only 75 Standard 11 briefs filed in the relevant time period in the Court of Appeals so that with the thousands of cases that that court has in criminal matters in a given year, I question just how important a safety valve Standard 11 is, if there are only 75.

MR. FLANAGAN: The paucity of filing it does not necessarily mean that it doesn't perform a safety valve function and because as it pertains to the defendant's safety valve concern, if a defendant knows he has the option but doesn't exercise that option it nonetheless works as a safety valve because it strengthens the attorney-client relationship.

JUSTICE CORRIGAN: Mr. Flanagan, I would just like some information

if you have them too. Since I've arrived at this Court I've had the privilege of looking at the number of grievances being filed against criminal appointed attorneys and it certainly is the single largest chunk of the Grievance Commission's business in any given year. I'm wondering, sir, if you know how many grievances are actually file in appellate representation cases against appointed attorneys.

MR. FLANAGAN: I don't but we met in May and discussed this topic in your office and soon thereafter I spoke with Robert Edick who was then the acting administrator and I asked him if he could break down the number of grievances and he said roughly 1/3 deal with appointed counsel and he did not break it down between trial and appellate.

JUSTICE CORRIGAN: I'm curious, sir, because at least in some of the data I saw that there are in the neighborhood of 1,200 or 1,300 grievances filed on a given year against criminal appointed attorneys in our state. Virtually all of those are dismissed. I'm wondering then not only in the area of Standard 11, but as you know and as the MJA task force pointed out, one of the significant issues for criminal lawyers is that they have to deal with these grievances that are filed on their performance after the fact and that those grievances are found to be naught in virtually all of the cases. That being the case, is the Commission working at all with the Grievance Commission to find any mechanism to relieve appointed attorneys of this burden. Has the Commission looked at it. What's their position in terms of the problem that we have of frivolous claims being filed against appointed attorneys with the Grievance Commission.

MR. FLANAGAN: To my knowledge the Appellate Defender Commission has had no contact with the Attorney Grievance Commission. A few years ago when Mr. Thomas was the grievance chair I did have a meeting with him along with my predecessor and we tried to coordinate ways in which duplication of effort would be eliminated but we never came to any final agreement on it.

JUSTICE CORRIGAN: Do you see this as a significant problem that needs addressing, and is Standard 11 the only solution that we've had.

MR. FLANAGAN: It's a little apples and oranges situation. Whether Standard 11 continues or not, the grievances will continue. I don't think it's a product of the existence of the 20 minimum standards. Grievances are up over the last 10 years primarily because prison terms are longer. We have tripled our prison population since 1987. We used to have 17,000. We're now approaching 50,000. It's a product of a lot of things and if the Court ultimately gets rid of the standards and replaces them with the Rule of Professional Conduct as the MJA has proffered, then I don't think that's going to

have any dent whatsoever in the amount of grievances that the AGC and my office receive. Sometimes we get them and the AGC doesn't; vice versa. Sometimes we both get them. People who are behind bars tend to complain. That's just a sad reality of the situation.

JUSTICE MARKMAN: Mr. Flanagan, I understand your safety valve argument and your argument relating to grievances. My experience on the Court of Appeals was that more often than not when we got these briefs they might produce a late paragraph in the opinion along the lines we reviewed the other 16 arguments raised in the Standard 11 brief and find them to be without merit. Is it your view that these briefs have contributed in any significant way either to the development of the law or to the just resolution of individual cases and is that even a fair question in your judgment.

MR. FLANAGAN: Well part one, no I don't think it is a fair question because we don't really count on unsophisticated defendants to develop the law in any significant way. But as far as

JUSTICE YOUNG: How about just resolution. Do they in any material sense over the aggregate materially advance the search for truth in a particular case.

MR. FLANAGAN: Occasionally they do. There are anecdotal situations where in fact the attorney has said no, the defendant has said I think I'm right and the defendant has filed his Standard 11 brief and prevailed. They are few and far between but they're out there.

JUSTICE CORRIGAN: Do we have any data on that because I think I can think of but one case in my career of almost 9 years now where Standard 11 succeeded but do you have any data

MR. FLANAGAN: There is one highlighted in my letter that is somewhat a significant one. People v Robin Benson out of Clinton County, I believe it was, where the issue that was raised by the defendant pro per resulted in a reversal and changed the fellow's prison sentence from 15-30 years to 3 years, time served and he walked out of the courtroom so there are those situations that occur. But I'm not going to try to delude the Court into thinking that this is a way in which the law is seriously advanced. It's not advanced. Is there a just resolution, Justice Young. I believe there is because the next court where this defendant might take his claims to this Court or ultimately to the federal courts, at least he won't have to go through the exhaustion problem. He has raised it and he won't be going back to the trial court with a new motion for relief from judgment cluttering up the court system even more because while this might reduce temporarily the

Court of Appeals burden, and I will address in a second why I don't think it is much of a burden, but it might temporarily reduce that, that just means these claims are going to be raised elsewhere so the defendant will go back with a motion for relief from judgment or he's come up to this Court with a pro per app that tries to raise new issues and will more than likely be shut out.

JUSTICE CORRIGAN: But what's the matter with relegating him or her to the motion for relief from judgment procedure to raise all those unexhausted issues. That is a fair process that Michigan has to deal with these problems, the post-conviction process.

MR. FLANAGAN: As Your Honor is aware, the procedural hurdles increase and get higher once you get into these post conviction proceedings. The biggest procedural hurdle in a motion for relief from judgment is the good cause hurdle of 6.508. The only good cause that any appellate court has accepted so far, or a trial court, is ineffective assistance of appellate counsel. I will grant your relief, Mr. Defendant, because your appellate attorney was ineffective. That is an incredibly difficult burden as this Court knows. Courts dislike the ineffective assistance tag, be it trial counsel or appellate counsel, so it's not as good an option.

JUSTICE YOUNG: But if counsel wasn't ineffective on appeal, then there really isn't any harm, is there.

MR. FLANAGAN: I don't think it is quite so simple to make that connection because

JUSTICE YOUNG: Well that's what I'm asking you to supply. If the issues that the criminal defendant would have raised in a Standard 11 brief were without merit such that the failure to raise them by an appellate lawyer would not constitute ineffective counsel, there is no harm.

MR. FLANAGAN: They might have been without merit in the sense that they did not prevail, but that doesn't mean that they didn't contain arguable merit. One of the standards that you're considering revamping, Standard 9, puts the burden on appellate counsel to raise all issues of arguable legal merit. That is a fine line to be drawn. If you've got 10 potential issues, you know it's very difficult to go to the court and raise all 10 of those and expect to get them equally reviewed. You want to separate the weak from the chafe and give it your best shot. On the other hand, you've got this conundrum of what to do with protecting yourself against the claim of ineffective assistance of appellate counsel and protecting your client's rights in order to go on further. You have to draw the line

someplace. If you draw that line at 5 of the 10 issues but the client insists that these others be raised, Standard 11 provides them with that vehicle even if ultimately those issues do not prevail. That does not mean there wasn't benefit to the process by those issues being raised.

JUSTICE CORRIGAN: But why isn't an equally valid process like the one used in federal court when you go back under the motion for relief from judgment procedure the client then proceeding in pro per can raise them and if it is a good issue will be able to say my lawyer declined to raise that issue at the time. Would that not suffice for good cause.

MR. FLANAGAN: No because the door is slammed unless it is truly ineffective assistance of appellate counsel.

JUSTICE CORRIGAN: Well we've never practiced under that egis in this state since the adoption of Standard 11. We don't know the answer, do we. I mean you're contemplating a universe of the current standards versus a universe where you had a lawyer who was calling the shots instead of the lawyer and client during the direct appeal, and the opportunity for the client then on relief from judgment to raise all these issues and claim that the lawyer declined to raise them and that the issue is meritorious. It seems to me that good cause would be satisfied. And actual prejudice. Both.

MR. FLANAGAN: Your Honor, disregarding the question of the merit of these issues, there is a burden on all levels of the Court here if this Standard 11 is taken back because substitutions of counsel will increase. Grievances will increase. Complaints will increase. The attorney-client relationship will diminish in many cases. So if Standard 11 is taken away then the attorney while the appeal is pending in the Court of Appeals, the defendant will go back to the trial court and say my attorney is unreasonable. Please appoint me a new attorney. Obviously that is not enough in and of itself to have that relief granted, but it happens quite often. More often than not the path of least resistance is adopted by the trial courts and they will grant a pro per motion for substitution of counsel. That slows the process down. As former chief judge of the Court of Appeals you recognize that you're trying to get cases churned out within 12-18 months and that slows down the process even further.

JUSTICE MARKMAN: To follow up on that point, why can't we view this in a very pragmatic kind of way and that is that this is a zero sum game and to the extent that we have to devote more time to these issues that have been rejected as being reasonable issues by a member of the bar, we are necessarily going to be getting shorter and shorter shrift of those issues that are valid issues and that ought to take more time and

consideration of this Court.

MR. FLANAGAN: That's a practical way to look at it.

JUSTICE MARKMAN: Is there anything wrong with looking at it through that kind of prism.

MR. FLANAGAN: Only in that it seems to not consider the impact at the next stage of the proceedings. If you can't raise them in the Court of Appeals, believe me a litigious defendant will raise them to your Court in a pro per application. You've seen the form applications. There's an area for new issues added. If they don't do that they're going to go back to the trial court, raise them in a motion for relief from judgment. That will be denied. They'll be back to the Court of Appeals with an application. The Court of Appeals will be reviewing now the issues they wouldn't have reviewed the first time around. I think for purposes of finality and purposes of getting all the issues contained in one appeal, which is I trust what the courts are looking for, the best way to go is to continue the Standard 11 and

JUSTICE YOUNG: Would you countenance any limitation other than those imposed now.

MR. FLANAGAN: Yes I would and this is where I'm putting on my private had because the Commission hasn't taken a position on this. I believe the Court of Appeals proposal in either 99-35 or 9956, whichever it is, is very reasonable. The fact of the matter is Standard 11 briefs often come in after the prehearing division at the Court of Appeals has prepared their report, the case is ready for orals, boom here's a motion for relief to file a Standard 11 brief and that slows the process down. The Court of Appeals proposal has two aspects to it that I like. One is the 20-page limit and one is the 84 days after the filing of the appellate brief. I think that's a very reasonable solution. It will eliminate some of the eleventh hour situations that arise and you won't be seeing a 100 page pro per supplemental brief if you see them at all. However, with one cautionary word. I think that the Court of Appeals proposal is a good thing. The way it's written right now it's absolute. 84 days, 20 pages. There is no leeway. Well the fact of the matter is, many defendants aren't even aware that they have this right. If the attorneys don't tell them they have this right, it's a meaningless right. They can't exercise something that they don't know about. Or they know about the right but they get the transcripts 70 days after those 84 days are eaten up. For good cause shown, there should be a way to get around those limitations in exceptional cases.

JUSTICE YOUNG: So you want more ancillary litigation on Rule 11.

MR. FLANAGAN: By meaning separate motions for, no more ancillary litigation than an attorney trying to file a motion to exceed the 50 page limit. I mean if a defendant is strapped to do it within 20 pages or 84 days, he's got a heavy burden. 7.212(B) currently states that for attorneys motions for briefs exceeding 50 pages are disfavored and I can't remember the exact language but there is a high burden on the attorney to show why it's needed. A similar high burden could be put on the pro per Standard 11 briefs and in fact I think most of them are going to come in within that time period if you get them at all and I just, to wrap up here, I'll answer any more questions you might have but Chief Deputy Clerk Sandra Mingle just provided me with the stats for calendar years 1998 and 1999 and in both of those years the numbers have kind of run true again. In 1998 there were 59 Standard 11 briefs docketed. IN 1999 there were 68. For the 4-year period for which we've got numbers, there have been 279 briefs docketed out of 15,712 assigned appeals. That works out to 1.8 percent. So I guess it's my position that the burden on the Court of Appeals is not that great now and the burden on other courts will be greater if in fact Standard 11 is eliminated. Thank you very much.

JUSTICE WEAVER: Further question. Thank you Mr. Flanagan. Now the remaining matters, Items 4 and 5, 99-61 and 99-63, we have no one present to make any presentation so at this point we will be adjourned.